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In the

Supreme Court of the United States

OCTOBER TERM, 1962

MERCANTILE NATIONAL BANK AT DALLAS,
Appellant,
v.
C. H. LANGDEAU, RECEIVER FOR I.C.T. INSURANCE COMPANY,
Appellee.
No. 14

REPUBLIC NATIONAL BANK OF DALLAS,
Appellant,
v.
C. H. LANGDEAU, RECEIVER FOR I.C.T. INSURANCE COMPANY,
Appellee.
No. 15

APPELLEE'S SUPPLEMENTAL BRIEF AFTER RE-ARGUMENT

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APPELLEE'S SUPPLEMENTAL BRIEF AFTER RE-ARGUMENT

The following question arose during the argument of this cause concerning Texas Venue practice, and the Chief Justice asked that supplemental briefs be filed by each side on the point.

I.

The Question: IF THE SUPREME COURT OF THE UNITED STATES SUSTAINS APPELLANTS' POSI-

TION AND UPHOLDS THE ABSOLUTE PRIVILEGE OF THE TWO NATIONAL BANKS TO BE SUED IN DALLAS COUNTY, TEXAS, WILL THE ENTIRE CAUSE WITH ALL DEFENDANTS BE TRANSFERRED TO DALLAS COUNTY, OR, IN THE ALTERNATIVE DOES THE TRIAL COURT, IN HIS DISCRETION HAVE THE POWER TO TRANSFER THE ENTIRE CAUSE AS TO ALL DEFENDANTS TO DALLAS COUNTY, TEXAS.

II.

The inquiries with reference to the particular point grew out of the following statements made by counsel for Appellants.

Appellants in their statement to the Court insisted that in the event this Court sustains the Appellants' position herein, the entire cause of action as to all defendants will be transferred to Dallas County, or, at the very least, the trial Court would have the discretion to transfer the entire cause as to all defendants to Dallas County, and if this be true, Appellee's argument would be untenable.

III.

Appellants in their "Memorandum after Reargument," seem to have abandoned the position they took on this point during oral argument. They now say that under Rule 89, Texas Rules of Civil Procedure, "Upon sustaining Appellants' venue pleas, this cause as to each appellant—at least—should be transferred as to it * * *. Each Appellant seeks

only such a transfer. Each Appellant opposes here, and would have opposed in the Texas Courts, transfer of Appellee's whole cause to Dallas County, Texas."

Appellee submits that Appellants have abandoned their position, because the law of Texas governing venue is contrary to the position that Appellants orally took before this Court in oral argument.

RULE IN TEXAS

Venue in Texas is governed by Statute and not by Court Rule; the Court Rules only conform to the Statutes.

The rule of law governing this very point was announced by the Commission of Appeals in an opinion adopted by the Supreme Court of Texas in *Tunstill v. Scott*, 138 Tex. 425, 160 S. W. 2d 65, as follows:

> "The established rule as to transferring a cause when the plea of privilege of one of several defendants is sustained is stated by Chief Justice Alexander, when Justice of a Court of Civil Appeals, in Johnson v. First National Bank of Brenham, Tex.Civ.App., 42 S. W. 2d 870, 871, as follows: 'The rule seems to be that, where one of several defendants files a plea of privilege to be sued in the county of his residence, and the plea is sustained, if the cause of action is a joint action growing out of joint liability of all the defendants, the suit must be transferred as an entirety to the county of the residence of the defendant whose plea is sustained. On the other hand, if the cause of action against the several defendants is severable, or joint and several, the court should retain jurisdiction over the action in so far as it concerns the defendants whose pleas of privilege have not been sustained, and should transfer the suit in so far as it concerns the defendant whose plea is sustained'."

This rule is reiterated by the Supreme Court of Texas in *International Harvester Company v. Stedman*, 159 Tex. 593, 324 S. W. 2d 543, 545.

The Court also points out that the rule originated in the case of *Johnson v. First National Bank of Brenham*, 42 S. W. 2d 871.

A JOINT AND SEVERAL CAUSE OF ACTION

Appellee's petition in this cause alleges a joint and several cause of action against defendants, charging them as joint conspirators.

In *State v. Standard Oil Company*, 130 Tex. 213, 107 S. W. 2d 550, Chief Justice Cureton, of the Texas Supreme Court, states with reference to a conspiracy action:

> "An 'actionable civil conspiracy' is a combination by two or more persons to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means. Under the conspiracy charges of the petition, if proven, each of defendants in error is responsible for all acts done by any of the conspirators in furtherance of the unlawful combination."

In *Massey v. Farnsworth*, 353 S. W. 262 (Tex. Court of Civ. App.), the Court announces:

> "Conspirators are jointly and severally liable for all damage resulting from the conspiracy, each being responsible for the acts of the other in furthering the common design."

In *Solomon v. United States*, 276 Fed. 2d 669, Sixth Circuit, the Court states:

> "It is well settled that the liability of conspirators is joint and several liability."

Thus, under the rule of the Supreme Court of Texas announced in *Tunstill v. Scott*, 138 Tex. 425, 160 S. W. 2d 65, "if the cause of action against the several defendants is severable, or joint and several, the Court should retain jurisdiction over the action in so far as it concerns the defendants whose pleas of privilege have not been sustained and should transfer the suit in so far as it concerns the defendant whose plea is sustained."

In this case, if the position of the Appellant National Banks is sustained, the trial Court must retain jurisdiction over the action in so far as it concerns the defendants whose pleas of privilege have not been sustained (and the defendants who did not file pleas of privilege).

IV.

Appellants now urge in their "MEMORANDUM AFTER REARGUMENT" that Appellee could have initially filed suit against all defendants in Dallas County under Article 1995, Section 4, Revised Civil Statutes of the State of Texas, 1925, as an alternative to filing suit in the District Court of Travis County, Texas, the County and Court in which the delinquency proceedings were pending pursuant to the provisions of Article 21.28, Sec. 4(f), Texas Insurance Code.

It is respectfully submitted that this was not an acceptable alternative under the unusual and strict requirements of Article 1995, Section 4. This Section of the Texas Venue

Statute requires that the plaintiff, in limine, on the hearing on the plea of privilege, prove by a preponderance of the evidence, not only that one of the defendants is a resident of the County wherein the suit is filed, but also he must prove by a preponderance of the evidence his cause of action against such resident defendant. *Stockyards National Bank v. Maples*, 127 Tex. 633, 95 S. W. 2d 1300; *Hammonds v. Houston Electric Company*, 169 S. W. 2d 765.

In a case as complex and difficult as is the case at bar, with as many defendants, a plaintiff would be foolish to accept the hazards of having to prove his case on the merits by a preponderance of the evidence on the hearing on the plea of privilege at such an early stage of the proceeding, because if for any reason he should fail at this stage to sustain his cause of action by a preponderance of the evidence against the resident defendant, the venue would fail and all of the pleas of privilege that would undoubtedly be filed in this cause would immediately be good. The resulting proliferation of the cause by the sustaining of innumerable pleas of privilege would make the trial of this cause, from a practical standpoint, impossible.

This was the purpose of the Texas Insurance Code, 21.28, Sec. 4(f), which made it expressly possible to sue all of the defendants in Travis County without the necessity of proving in limine by a preponderance of the evidence a cause of action against any of the defendants. Under this Section of the Statute the Court is only required to determine that at

the time of the commencement of the suit delinquency proceedings under the provisions of Article 21.28, Sec. 4(f), Texas Insurance Code, were and are still pending in the Court and County wherein the suit was instituted, and that the suit was commenced by the statutory liquidator. *Bouknight v. Williamson*, 314 S. W. 2d 429 (Writ of Error Dis.).

Respectfully submitted,

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PROOF OF SERVICE

I, W. E. CURETON, one of the attorneys for C. H. LANGDEAU, Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on December 11, 1962, I served copies of the foregoing supplemental brief on the Appellants by depositing the same in the United States Mail, with first-class postage prepaid, addressed to counsel of record for Appellants to each of them at the following post office addresses:

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